SUPREME COURT OF KENTUCKY
FILE NO. 2013-SC-000685-D

NISSAN MOTOR COMPANY, LTD. and NISSAN NORTH AMERICA, INC. — APPELLANTS

APPEAL FROM KENTUCKY COURT OF APPEALS
No. 2012-CA-952

vs.

APPEAL FROM LINCOLN CIRCUIT COURT
CIVIL ACTION NO. 2010-CI-82

AMANDA MADDOX — APPELLEE

BRIEF FOR APPELLEE

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Certificate of Service

I certify that a copy of the foregoing was sent by U.S. First Class Mail on December 12, 2014 to: Hon. David Tapp, Judge, Lincoln Circuit Court, P.O. Box 1324, Somerset, KY 42502-1324; Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; John L. Tate, Bethany A. Breetz, Stites & Harbison, PLLC, 400 West Market St., Ste. 1800, Louisville, KY 40202-3352; David T. Schaefer, Anne K. Guillory, Dinsmore & Shohl, LLP, 101 South Fifth St., Ste. 2500, Louisville, KY 40202; Virginia Hamilton Snell, Wyatt Tarrant & Combs, LLC, 500 West Jefferson St., Ste. 2800, Louisville, KY 40202; Curt Cutting, Eric S. Boorstin, Horvitz & Levy, LLP, 15760 Ventura Blvd., 18th Floor, Encino, CA 91436-3000; Griffin Terry Sumner, Jason P. Renzelmann, Frost Brown Todd, LLC, 400 West Market St., 32nd Floor, Louisville, KY 40202-3363; and, Victor E. Schwartz, Philip S. Goldberg, Shook Hardy & Bacon LLP, 1155 F St. N.W., Ste. 200, Washington, D.C. 20004.

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STATEMENT CONCERNING ORAL ARGUMENT

The issue before the Court is a common one – sufficiency of the evidence. Oral argument is not necessary, but welcome by Appellee, Amanda Maddox.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Issue

The only issue before the Court is whether there is sufficient evidence to support punitive damages. Nissan fails to mention or address the standard of review for a sufficiency of the evidence appeal.

The standard of review, as recently stated by this Court, is:

> The role of an appellate court, when reviewing evidence supporting a judgment entered upon a jury verdict, is limited. The Court must only determine whether the trial court erred in failing to grant the motion for directed verdict. In doing so, all evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence. This Court, when reviewing a ruling on a motion for directed verdict, must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Finally, the appellate court must determine whether the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice.[1]

While some of the facts contained in Nissan's Statement of the Case are accurate, most are either inaccurate or contested facts which Nissan portrays in the light most favorable to Nissan. The best example of Nissan's deceptive portrayal of the evidence is Nissan's failure to mention the product defects giving rise to Amanda's product liability claims. Not once in its 38 page Brief does Nissan disclose to the Court that Amanda's seat belt spooled out between 9 and 10 inches of webbing during the collision, or that her seat collapsed, the combination of which allowed her to "submarine" under the lap belt portion of her seat belt, causing her catastrophic abdominal, orthopedic and nerve injuries. Nissan's failure to disclose the 9 to 10 inches of seatbelt spoolout is made even more incredible by

[1] *Osborne v. Keeney,* 399 S.W.3d 1, 8-9 (Ky. 2012) (internal quotation marks, footnotes and citations omitted).

the fact that this evidence *was uncontested* – other than Nissan's experts measuring the seat belt spoolout at 9 to 9¼ inches[2] and Amanda's experts measuring the seat belt spoolout at 9½ to 10 inches.[3]

Because Nissan so extensively misstates the facts, and cites contested evidence in the light most favorable to Nissan, Amanda has prepared a summary of Nissan's misstatements, compared with the actual evidence. This summary is located in the Appendix of this Brief at tab 1.

Amanda's Evidence at Trial

Here is the evidence upon which the jury awarded punitive damages:

Background Evidence

1. Federal Motor Vehicle Safety Standards (FMVSS) were adopted in 1966 to promote motor vehicle safety.[4] FMVSS 208,[5] "Occupant Crash Protection," requires crash testing with belted and unbelted crash test dummies, and sets minimum performance standards. Forces imparted to the head, neck, chest and femurs of instrumented crash test dummies are measured. FMVSS 208 barrier crash tests are run at 30 miles per hour with 50th percentile Hybrid III adult male [171 pounds] crash test dummies in the driver and right front passenger positions (the positions occupied by Dwayne and Amanda Maddox). To meet FMVSS 208 crash test requirements, an unbelted dummy must not sustain serious injury.[6]

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[2]Jeffrey Pearson, Nissan's seat belt expert, and Dr. Elizabeth Raphael, Nissan's occupant kinematics and injury causation expert, measured the seat belt spoolout at 9 to 9¼ inches. Jeffrey Pearson (VR: 12/14/11; 12:39:46); Elizabeth Raphael (VR: 12/14/11; 16:02:50-16:03:01).

[3] Gary Whitman, Amanda's seat belt expert, and Paul Lewis, Amanda's occupant kinematics and injury causation expert, measured the seat belt spoolout at 9½ to 10 inches. Gary Whitman (VR: 12/06/11; 12:23:48-12:24:13, 15:50:17-15:50:30); Paul Lewis (VR: 12/07/11; 11:03:55-11:04:30).

[4] 49 *C.F.R.* §571, *et seq.*

[5] 49 *C.F.R.* §571.208.

[6] 49 *C.F.R.* §571.208 S5.1.2 (Unbelted test). The thresholds for serious injury are stated in terms of "accelerations and forces placed on an occupant's [dummy's] head, chest and upper leg." *Id.* at S6 "Injury Criteria for the Part 572, Subpart E, Hybrid III Test Dummy."

2. FMVSS 209, "Seat Belt Assemblies," requires that every "seat belt assembly shall be capable of adjustment to fit occupants whose dimensions and weight range from those of a 5th-percentile adult female [102 pounds] to those of a 95th-percentile adult male [223 pounds]."[7]

3. The Federal Motor Vehicle Safety Standards "are minimum standards,"[8] which do not cover all aspects of vehicle safety. The Standards do not specify how seat belts should be designed, or whether seat belt webbing should, or should not, spool out in a crash.

4. The Federal Vehicle Motor Safety Standards do not require, or prohibit, seat belt "load limiters." Load limiters are devices used to reduce the force a seat belt applies to the occupant's chest during an accident. There are various types of load limiters, including "rip-stitch loops" (a fold sewn into the seat belt webbing which may rip open during an accident); "ladder type" (the seat belt retractor is allowed to travel up a ladder, with resistance from a set of open, metal teeth); and, "torsion bar" type (the locked seat belt retractor is allowed to rotate on a deformable bar, allowing seat belt spoolout). Nissan incorporated a torsion bar load limiter in the Maddox's Nissan Pathfinder.[9]

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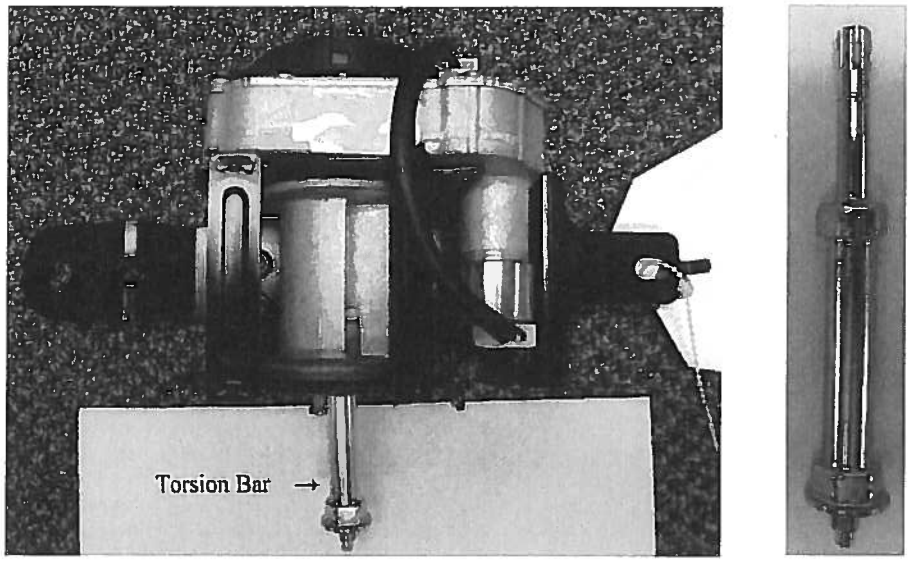
[7] 49 *C.F.R.* §571.209 S4.1(g)(1).

[8] 49 *U.S.C.* §30102(a)(9)("'motor vehicle safety standard' means a minimum standard for motor vehicle or motor vehicle equipment performance.")

[9] Gary Whitman (VR: 12/06/11; 12:27:42-12:28:21, 14:52:27-14:53:16).



Nissan seat belt retractor (webbing removed) with torsion bar type load limiter

5. FMVSS 207,[10] "Seating Systems," has requirements for seat anchorages and seat back strength, but no requirements for seat pan strength. The seat pan is the structure which supports the bottom seat cushion *and* the occupant.

6. Federal Motor Vehicle Safety Standards are compliance standards which must be met by all vehicles sold in the United States. The U.S. Government does not "certify" that vehicles meet the FMVSS, but rather each auto manufacturer certifies to the U.S. Government (and the public) that each of its vehicles meets these minimum standards. (As is apparent from the vast number of safety recalls, many vehicles are certified as meeting FMVSS, only to be later recalled due to a "defect [which] is related to motor vehicle safety; or … does not comply with an applicable motor vehicle safety standard."[11])

7. In 1986, NHTSA began its New Car Assessment Program (NCAP). The NCAP frontal barrier test is conducted like the FMVSS 208 frontal barrier test, but with seat belted 50th-percentile male dummies in the driver's seat and the right front passenger's

[10] 49 *C.F.R.* §571.207.
[11] 49 *U.S.C.* §30118(c).

seat, and at 35 mph instead of 30 mph.[12] In 1994, the NCAP changed from reporting crash test performance based on measured forces (head injury criteria, neck forces, chest deflection and femur loads) to a "star rating" system.[13]

8. The enabling legislation for the Federal Motor Vehicle Safety Standards states the standards are "minimum standards."[14]

9. The enabling legislation for the Federal Motor Vehicle Safety Standards specifically provides that: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."[15]

The Nissan Pathfinder

10. The 1996 – 2004 model years Pathfinder were designated by Nissan as its "R50" platform. The seat belt systems in the 1996, 1997, 1998 and 1999 model years of the R50 Pathfinder *did not* contain a load limiter, and *did not* allow seat belt spoolout in accidents. The 1996 – 1999 Pathfinders received NCAP's four star frontal crash rating (risk of injury less than average).[16]

11. Nissan redesigned the front seat belt systems for its 1999½ model year R50 Pathfinder to include a load limiter.[17] The addition of the load limiter increased the passenger's frontal crash rating from a four star to a five star. NCAP frontal barrier crash test reports and video for the 1999½ - 2004 Pathfinders reveal that the load limiter allows 2 inches of seat belt spoolout for the 171 pound dummy in the 35 mph crash test (38 mph velocity change (delta-*v*) with vehicle rebound).[18] 1¾ inch of belt spoolout decreases chest

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[12] The NCAP was mandated under Title II of the Motor Vehicle Information and Cost Savings Act of 1973 (15 U.S.C. §1942 *et. seq.*). *See,* L. Hershman, *The U.S. New Car Assessment Program (NCAP): Past, Present and Future*, NHTSA Paper Number 390, at 2.
[13] One star being the worst rating; five stars being the best rating.
[14] 49 *U.S.C.* §30102(a)(9).
[15] 49 *U.S.C.* §30103(e).
[16] Gary Whitman (VR: 12/06/11; 16:55:16-16:55:24).
[17] Gary Whitman (VR: 12/06/11; 12:16:43-12:17:26).
[18] Gary Whitman (VR: 12/06/11; 12:20:13).

load during a crash, but is not enough spoolout to permit occupant submarining under the lap portion of the seat belt.

12. It is a standard practice for the automotive industry to conduct seat belt tests for the foreseeable range of occupants, from 5th percentile females to 95th percentile male occupants.[19] Occupant restraint testing, especially developmental testing, is primarily conducted with "sled" tests, a test which avoids the costs of crashing a vehicle.[20]

13. Nissan acknowledged the industry practice of conducting developmental seat belt testing, but in response to Amanda's written discovery requests for its developmental sled testing for its load limiter, Nissan responded that it had "destroyed" all such developmental tests and test results."[21] Nissan even claimed it had destroyed its "list of developmental reports applicable to the U.S. bound 1996-2004 R50 Pathfinder."[22]

14. Despite Nissan's pre-trial discovery responses stating it had destroyed all of its load-limiter developmental tests, Nissan introduced a test report, written in Japanese, as its trial exhibit 59. Nissan attempted to portray the test report, through its designated corporate representative, Kazuo Iwasaki, as a developmental sled test to determine how the load limiter performed with a 95th-percentile male. (A copy of this test report is located in the Appendix of this Brief at tab 2.) However, on cross-examination, Nissan's corporate representative was forced to admit that: (a) it was not a developmental test of Nissan; (b) the test was actually performed by its seat belt supplier, the Takata Corporation; (c) the test was only a seat belt hardware strength test, which did not test the amount of belt spoolout allowed by the load limiter with the 95th-percentile dummy; and, (d) the test did

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[19] Gary Whitman (VR: 12/06/11; 12:20:15; 12:12:02-12:12:38).

[20] In a sled test, the occupant compartment (body) of a vehicle, without its motor, transmission, axles, wheels, hood, fenders, etc., is affixed to a movable "sled." The sled can be "crashed" over and over into a barrier without damage to the car body. An instrumented dummy is seated in the "vehicle," where dummy movement and forces can be measured.

[21] Nissan's amended answers to Plaintiff's First Set of Interrogatories, No. 13. Nissan's discovery response, stating it had destroyed its load-limiter development testing was shown to the jury. (See Gary Whitman, VR: 12/06/11; 13:05:55-13:06:35).

[22] *Id.*

not measure injury forces to the dummy's head, neck, chest or femur.[23] Nissan's corporate representative admitted that the test only measured "how much [force] the seat belt can hold without breaking apart."[24] (Yet, Nissan persists in mischaracterizing the true nature of the Takata seat belt hardware test. Nissan tells this Court at page 11 of its Brief that "testing for 95th percentile dummies was performed," and deceptively claims it "resulted in testing without any issues, including the testing of loads measured on the shoulder belt and lap belt."[25] Nissan's portrayal of the Takata test to the jury was false and misleading, as is Nissan's continued portrayal of the test to this Court.)

15. Nissan's internal engineering design specifications for its front seat belts specified that seat belt webbing "shall retain the movement of the passenger," and "shall restrain passengers from impacting against the trim (secondary collision), in the event of a frontal and rear end collision...."[26] The Pathfinder's front passenger seat belt violated Nissan's own design standards.[27] (Amanda not only impacted the trim, her knees went through the dash, crushing the heat exchanger affixed to the vehicle firewall.)

16. Nissan's internal engineering design specifications for its load limiters specified the minimum force allowed to activate the load limiter, and the maximum amount of belt spoolout allowed.[28] The Pathfinder's front passenger seat belt violated Nissan's own design standards. (Seat belt testing performed by Amanda's restraint expert revealed that the load limiter deployed at much lower forces than allowed by Nissan's own design specification, and spooled out significantly more seat belt than allowed by Nissan's own design specification.[29] The 9 to 10 inches of spoolout in Amanda's seat belt in this collision violated Nissan's load limiter design specifications.)

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[23] Kazuo Iwasaki (VR: 12/13/11: 16:30:00-16:30:54).
[24] Kazuo Iwasaki (VR: 12/13/11; 16:30:55-16:31:45).
[25] *See* Nissan's Brief at 11, footnote 9.
[26] Amanda's trial exhibit no. 10.
[27] Gary Whitman (VR: 12/06/11: 12:37:50); Paul Lewis (VR: 12/07/11; 11:11:07; 11:12:30; 11:16:30; 11:59:32).
[28] Amanda's trial exhibit no. 19.
[29] Gary Whitman (VR: 12/06/11; 12:31:01-12:34:15).

17. Nissan's driver and front passenger seat pans consisted of a piece of weak sheet metal, 28/1,000th of an inch thick, which had no structural support.[30] The Pathfinder's front passenger seat violated Nissan's own design standards. (The seat collapsed in the accident.)

The Collision

18. Edward Sapp, a drunk driver, hit the Maddox's Pathfinder head-on. Dwayne Maddox, who was driving the Pathfinder, had no chance to avoid the collision. This was the type of serious collision where one must rely upon his or her seat belt to protect against serious injury.

19. The velocity change and collision forces to the Maddox vehicle were almost identical to the velocity change and collision forces of NCAP's 35 mph frontal barrier impact test. The NCAP frontal barrier test results in a vehicle velocity change (delta-*v*) of approximately 38 mph. As explained by Amanda's accident reconstructionist, Wayne McCracken, the test vehicle strikes a rigid barrier at 35 mph, and bounces off the barrier at approximately 3 mph, resulting in a velocity change of 38 mph.[31] Based on his crush measurements of the Maddox Pathfinder, Mr. McCracken testified that the velocity change of the Maddox vehicle was between 37.9 and 38.9 mph.[32]

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[30] Gary Whitman (VR: 12/06/11; 13:01:58-13:02:25).
[31] Wayne McCracken (VR: 12/05/11; 16:26:43–16:28:39).
[32] Wayne McCracken (VR: 12/05/11; 16:32:06-16:32:40). For simplicity, and in viewing the evidence in the light most favorable to Amanda, a delta-*v* of 38 mph will be used in this brief.

Maddox and NCAP Crush Comparison

Maddox 2001 Pathfinder[33]

2001 Pathfinder from NCAP Test No. 4263

20. The collision forces to the Sapp vehicle were much higher than to the Maddox vehicle, as the Pathfinder weighed substantially more than Sapp's Nissan Altima. Sapp's vehicle experienced a 60 mph velocity change according to Amanda's accident reconstructionist[34] and a 64 mph velocity change according to Nissan's accident reconstructionist.[35] This extremely high velocity change, combined with Sapp's failure to wear his seat belt, led to his fatal injury.[36]

21. Both Dwayne and Amanda were properly wearing their seat belts, and both the driver's and front passenger's side airbags deployed in the collision.[37]

22. Dwayne weighed 170 pounds – nearly identical to the weight of a 50th-percentile male crash test dummy, which weighs 171 pounds.[38]

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[33] The passenger side doors and "B" pillar were cut away by rescue personnel to aid in Amanda's removal from the vehicle.

[34] Wayne McCracken. (VR: 12/05/11; 16:38:22-16:38:38).

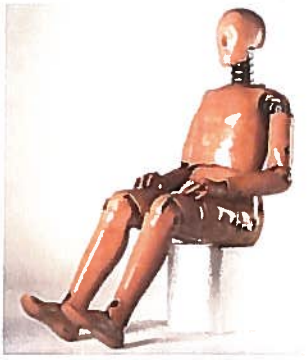
[35] Steven Bailo (VR: 12/08/11; 16:37:37-16:37:50).

[36] As Nissan points out, the amount of force increases exponentially with velocity increase. (Nissan's Brief at 3, fn. 7) Energy (or force) = ½ mass x velocity^2. Assuming Sapp weighed 171 pounds, like Dwayne Maddox or a 50th percentile male dummy, collision forces exerted on Sapp were 2.75 times greater than those exerted on Dwayne.

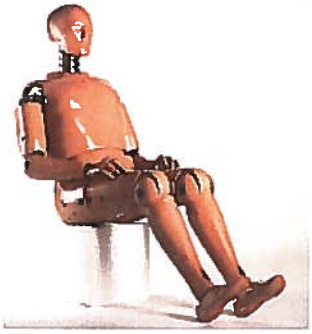
[37] Dwayne Maddox (VR: 12/06/11; 10:48:01-10:48:16); Amanda Maddox (VR: 12/08/11; 12:02:35-12:02:41).

[38] Dwayne Maddox (VR: 12/06/11; 10:58:05-10:58:16); and, Amanda's trial exhibit 9.

23. Amanda weighed 240 pounds, slightly more than a 95th-percentile male crash dummy, which weighs 223 pounds.[39]



Hybrid III 50% Male Test Dummy 171 Lbs



Hybrid III 95% Large Male Test Dummy 223 Lbs

Dwayne Maddox 170 Lbs

Amanda Maddox 240 Lbs

24. Amanda's restraint expert, Gary Whitman, testified that the dummy weights used to represent 50th percentile males and 95th percentile males were developed "decades ago" and did not accurately represent the current weight distribution of the U.S. population.[40] Based on government studies, Mr. Whitman testified that in the late 1990's, a study revealed that a 95th percentile U.S. male weighed 245 pounds.[41]

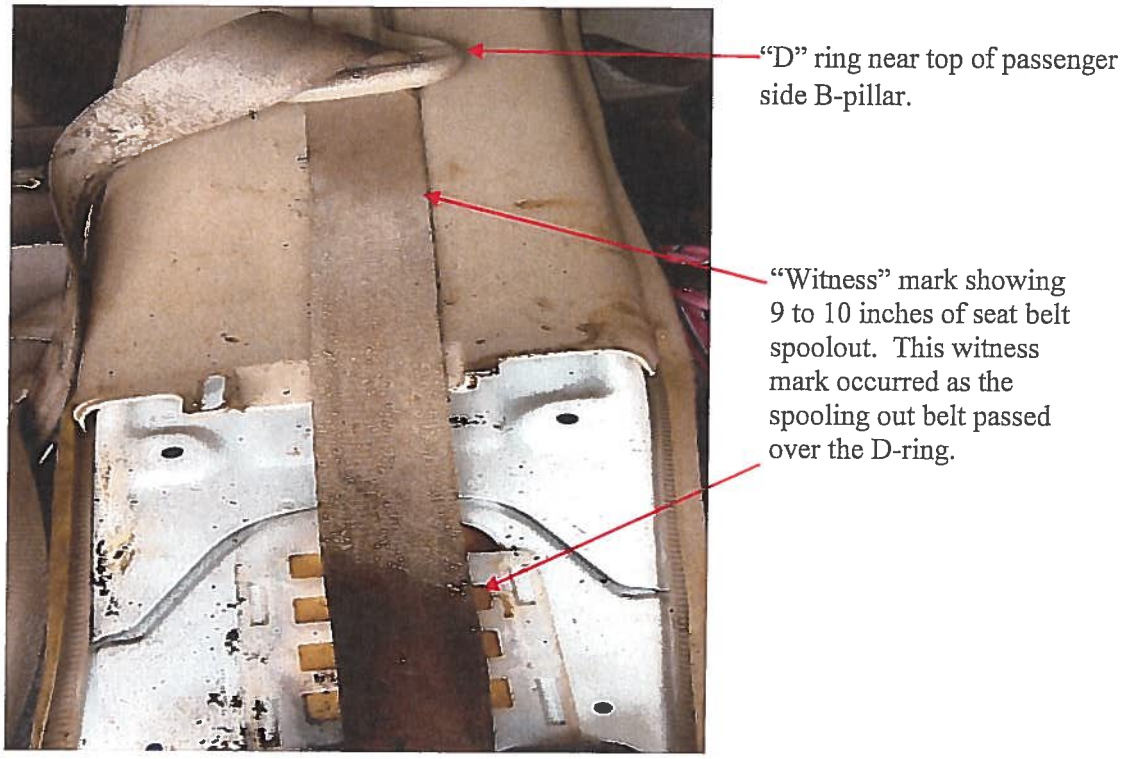
25. Both Dwayne and Amanda had undergone gastric bypass surgery to lose weight. They had the same surgical procedure performed by the same surgeon. (It was not

[39] Amanda Maddox (VR: 12/08/11; 11:52:34); and, Amanda's trial exhibit no. 9).
[40] Gary Whitman (VR: 12/06/11; 11:52:00-11:53:08).
[41] Gary Whitman (VR: 12/06/11; 11:52:00-11:53:09).

just Amanda's bypass that was ripped apart from submarining under the lap belt, she also suffered tears to her bowel.[42])

26. Dwayne, weighing what a 50th-percentile male dummy weighed, had 1½ inches of load limiter spoolout during the collision (like the 50th percentile dummy in the NCAP test).[43]

27. Amanda, weighing 240 pounds, had 9 to 10 inches of seat belt spoolout. The 9 to 10 inches of spoolout from Amanda's "restraint" system could not be contested.



Amanda's seatbelt

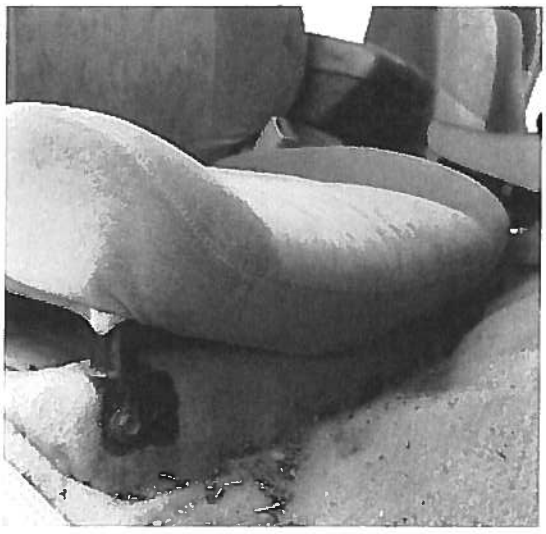
28. Dwayne literally opened the driver's door and walked away from the accident without serious injury. While he was treated in the local ER and released – he was

[42] Dr. Kearney (VR: 12/07/11; 16:32:11-16:34:08).
[43] Gary Whitman (VR: 12/06/11; 15:35:13-15:35:36).

never hospitalized or required surgical care.[44] He had a right foot fracture, which had nothing to do with seat belt spoolout.[45]

29. Amanda's seat collapsed in the collision.[46]

Pathfinder Seat Comparison



Amanda's collapsed seat

Exemplar Pathfinder seat

30. The physical evidence (9 to 10 inches of friction burn to Amanda's seat belt from the belt spooling over the "D" ring, the collapsed seat pan, and the imprint of Amanda's knee in the heat exchanger at the vehicle firewall), and the nature of Amanda's injuries (ripped bowel and stomach, and knee impact driving Amanda's left femur through its pelvic socket with resultant stretching of the sciatic nerve and permanent foot drop), proved that Amanda submarined under the lap belt portion of her seat belt.[47]

31. Dwayne and Amanda's testimony showed that Amanda submarined under the lap belt portion of her seat belt and out of her seat. Dwayne testified that immediately

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[44] Dwayne Maddox (VR: 12/06/11; 10:57:54-10:58:02).

[45] The Insurance Institute for Highway Safety (IIHS) conducts a 40 mph crash test. The IIHS awarded the Nissan Pathfinder a "Poor" crash rating due to the driver's floor pan buckling and trapping the dummy's right foot. (Amanda's trial exhibit 20.) Dwayne's foot fracture was to his right foot.

[46] Gary Whitman (VR: 12/06/11; 12:56:28-12:57:22).

[47] Gary Whitman (VR: 12/06/11; 13:05:17); Paul Lewis (VR: 12/07/11; 11:11:07; 11:59:32).

after impact, he reached for Amanda, but "she was not in her seat."[48] Amanda testified that after the collision "I wasn't in the seat," and that she "was looking up at the other [driver's] seat."[49]

Expert Testimony at Trial

32. The velocity change of the Maddox vehicle was 38 mph, and the forces imparted on the vehicle were almost identical to the forces encountered in the NCAP frontal barrier test.[50]

33. Occupant forces similar to those encountered in a NCAP frontal barrier test should not result in serious injury.[51]

34. The purpose of a seat belt is to restrain an occupant's movement by coupling the occupant to the seat.[52]

35. Submarining under the lap belt is a recognized injury hazard which has been known for decades. Submarining under the lap belt may be caused by seat belt slack, seat belt webbing spoolout and/or poor seat design.[53]

36. Submarining causes the lap belt to come off the occupant's strong bony pelvis and cut into the occupant's soft abdomen.[54]

37. Submarining allows the occupant to slide forward in the seat or even off the seat, and contact the vehicle dash or structures even beyond the vehicle dash (which Nissan's seat belt engineering standard specifies is not to occur).[55]

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[48] Dwayne Maddox (VR: 12/06/11; 10:51:05-10:51:41; 11:22:10-11:23:30).
[49] Amanda Maddox (VR: 12/08/11; 14:49:30-14:50:00).
[50] Wayne McCracken (VR: 12/05/11; 16:32:06-16:33:03; 16:41:42-16:43:24).
[51] Wayne McCracken (VR: 12/05/11; 16:43:23-16:43:35).
[52] Gary Whitman (VR: 12/06/11; 12:07:51); Paul Lewis (VR: 12/07/11; 10:56:29).
[53] Gary Whitman (VR: 12/06/11; 11:50:26); Paul Lewis (VR: 12/07/11; 11:54:36; 11:56:01).
[54] Gary Whitman (VR: 12/06/11; 11:50:25-11:51:04); Paul Lewis (VR: 12/07/11; 11:56:01-11:56:31).
[55] Gary Whitman (VR: 12/06/11; 11:50:26); Paul Lewis (VR: 12/07/11; 10:56:29; 11:12:30; 11:54:36; 11:56:01).

38. A seat belt system which allows 9 to 10 inches of seat belt spoolout in a collision is defective and unreasonably dangerous.[56]

39. Nissan's load limiter device violated Nissan's own design specifications, in that it: (a) spooled out more webbing than the design specification allowed; and, (b) at a much lower force than specified.[57]

40. Nissan's seat belt violated its own design specifications in that it failed to "restrain passengers from impacting against the trim (secondary collision), in the event of a frontal … collision…."[58]

41. Nissan's seat pan consisted of a thin piece of weak sheet metal, 28/1000th of an inch thick – thinner than a credit card - with no supporting structure. The seat was defective and unreasonably dangerous.[59]

42. Due to excessive belt spoolout, Amanda submarined under her lap belt. As her buttocks traveled toward the front edge of her seat, the seat pan collapsed. Her lap belt left her strong bony pelvis and applied force to her soft abdomen, causing her severe abdominal injuries. Amanda continued to move forward, under the lap portion of her seat belt, and out of her seat. Her knees went into the dash, through the glove box, and crushed the heat exchanger at the vehicle's fire wall (the metal structure separating the occupant compartment from the engine compartment). Amanda's right knee hit with such force that her right femur was driven through its pelvic socket, stretching the sciatic nerve and leaving Amanda with permanent foot drop.[60]

43. Had Amanda remained restrained during the accident (*i.e.,* had her seatbelt not spooled out 9 to 10 inches, her seat pan not collapsed, and had she not submarined

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[56] Gary Whitman (VR: 12/06/11; 12:23:25-12:24:12).
[57]Gary Whitman (VR: 12/06/11; 12:31:40); Amanda's trial exhibit 26.
[58]Gary Whitman (VR: 12/06/11; 12:37:50); Paul Lewis (VR: 12/07/11; 11:11:07; 11:12:30; 11:16:30; 11:59:32); Amanda's trial exhibit no. 10.
[59]Gary Whitman (VR: 12/06/11; 12:02:22).
[60]Gary Whitman (VR: 12/06/11; 12:41:35; 12:56:57); Paul Lewis (VR: 12/07/11; 11:07:26; 11:11:07; 11:59:32). Fortunately, Amanda's left knee struck the heat exchanger, which acted as a "good energy absorber," and prevented a left pelvic socket fracture. Gary Whitman (VR: 12/06/11; 12:46:41-12:47:21).

under the lap belt), she would not have suffered these injuries.[61] Even Nissan's injury causation expert, Dr. Raphael, agreed that Amanda's abdominal injuries were caused by the lap belt, and that Amanda's pelvic fracture was caused from her knee striking the heat exchanger and driving the femur through its pelvic socket.[62]

44. Alternative safer seat belt designs introduced at trial, such as the Nissan Pathfinder seat belt without a load limiter, the Volvo load limiter which only allowed approximately two inches of spoolout, and the Chrysler Sebring cinching latch plate, would have prevented Amanda from submarining under her lap belt, and her resulting injuries.[63] Gary Whitman demonstrated to the jury how the Volvo load limiter only allowed a small amount of spoolout, and how the cinching latch plate would not allow the belt spoolout to be transferred from the shoulder portion of the seat belt to the lap portion of the seatbelt.[64]

45. A safer seat design, like the structurally sound Volvo and Saab seats which Mr. Whitman showed the jury, would not have collapsed or contributed to Amanda submarining under the lap portion of her seatbelt.[65]

46. The *only* reason Amanda's seat belt spooled out so much here (9 to 10 inches) and Dwayne's seat belt did not (1 to 2 inches), was because Amanda weighed more. Of course, as a matter of physics, Nissan was fully aware that the heavier the occupant the greater the belt spoolout.[66]

47. Nissan destroyed its load limiter developmental test reports and video.[67] These test reports would show whether Nissan tested the load limiter for occupants weighing more than 171 pounds. Nissan even destroyed its "list" of the load limiter

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[61]Paul Lewis (VR: 12/07/11; 12:14:02-12:14:42).
[62]Elizabeth Raphael, M.D. (VR: 12/14/11; 16:48:37; 16:48:50).
[63]Gary Whitman (VR: 12/06/11; 12:43:22-12:43:57, 13:23:15-13:25:02).
[64]Gary Whitman (VR: 12/06/11; 12:42:24-12:43:58, 13:23:22-13:25:02).
[65]Gary Whitman (VR: 12/06/11; 12:52:28; 12:58:30; 13:23:16; 13:24:15); Paul Lewis (VR: 12/07/11; 11:07:26; 11:16:30; 11:20:55; 11:54:36; 11:56:01).
[66] Gary Whitman (VR: 12/06/11; 12:23:57; 12:21:33). *And see* Nissan's Brief at 3, footnote 7 (energy = ½ mass x velocity^2).
[67] Evidence of Nissan's destruction of its load limiter developmental test, consisting of Nissan's response to Amanda's discovery request, was read to the jury. Gary Whitman (VR: 12/06/11; 13:05:54-13:06:35).

development tests it performed. Mr. Whitman described Nissan's destruction of its developmental tests as a "very bad protocol," and a bad engineering practice.[68]

48. The National Highway Traffic Safety Administration (NHTSA) never expected car companies to install load limiters that allowed nearly unlimited belt spoolout. Volvo of America Corporation wrote to NHTSA about the wisdom of allowing load limiters with no upper limit for belt spoolout specified, as this could allow occupant ejection in rollover accidents. NHTSA responded to Volvo's concern, in the Federal Register, stating:

> While the agency agrees that this is a legitimate concern, it does not believe it is necessary to specify such an upper limit at the current time. It is not likely that manufacturers will design load-limiting belt systems that will elongate appreciably beyond the limits specified in Standard No. 209. .... If a load-limiting belt design elongates to the extent that it would provide no protection in roll-over accidents, it would also not provide any protection in frontal crashes. Therefore, it is not likely that manufacturers would permit such extensive elongation in their systems. .... Manufacturers should be cognizant of the point made by Volvo, however, during the development of their systems.[69]

49. NHTSA had never required load limiters, and the safety benefits of load limiters remained under investigation.[70]

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[68] Gary Whitman (VR: 12/06/11; 13:06:22-13:07:20).

[69] Amanda's trial exhibit 27.

[70] National Highway Traffic Safety Administration, Evaluation Program Plan, 2008-2012; DOT HS 810 983, at 4 (August, 2008) (load limiters still under investigation – evaluation of load limiters to be complete when sufficient data accumulates). *Amici Curaie,* Association of Global Automakers, etc., cite a 2013 study, obviously not in evidence, which reported a safety benefit in passenger cars with load limiters, but found no such benefit in light trucks and SUVs, such as the Nissan Pathfinder. (Ass'n of Global Automakers, etc. Brief at 8, citing National Highway Traffic Safety Admin., DOT HS 811 835, *Effectiveness of Pretensioners and Load Limiters for Enhancing Fatality Reduction by Seat Belts 2* (2013)).

50. The Insurance Institute for Highway Safety conducted a study regarding load limiters, and discovered that deaths had increased 36% in accidents involving vehicles with load limiters.[71]

51. Nissan claimed its load limiters "complied" with Federal Motor Vehicle Safety Standards. While technically true, FMVSS do not require load limiters, or provide any standards pertaining to load limiter spoolout. In fact, FMVSS do not even require a seat belt to restrain an occupant in his or her seat. And FMVSS contain *no* performance requirements or injury criteria for occupants weighing over 171 pounds. It's up the manufacturer to use reasonable care to design a vehicle to protect foreseeable occupants.

52. In 2002, General Motors issued a safety recall for its 1997 Blazer, Jimmy and Bravada sports utility vehicles because the energy absorbing loop designed into the seat belt system (a rip-stitch load limiter)[72] allowed up to "10 additional inches of webbing into the seat belt system."[73] General Motors determined that a seat belt system which allowed up to 10 inches of seat belt payout in an accident constituted "a defect that relates to motor vehicle safety."[74] General Motors instituted a voluntary safety recall to eliminate this defect.

53. Nissan knew its load limiter allowed a large amount of webbing spoolout for heavier occupants. Not only did Nissan not institute a safety recall, Nissan gave no warning or instruction regarding this dangerous amount of seat belt spoolout – not in the vehicle, the owner's manual, or anywhere else.[75]

54. Amanda Maddox suffered catastrophic injuries and damages. Nissan did not contest the seriousness of Amanda's injuries, the fact she underwent 75 surgical

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[71] M. Brumbelow, *Effects of seat belt load limiters on driver fatalities in frontal crashes of passenger cars.* Institute for Insurance Highway Safety, SAE presentation, May 16, 2007, as discussed by Gary Whitman at trial. Gary Whitman (VR: 12/06/11; 13:11:04-13:14:13).

[72] Gary Whitman (VR: 12/06/11; 14:52:30-14:53:16).

[73] Gary Whitman (VR: 12/06/11; 14:52:45; 13:21:23-13:23:02).

[74] GM Recall, 03V-117.

[75] Gary Whitman (VR: 12/06/11; 13:02:24-13:03:56).

procedures, or her $1.29 million in medical expenses. Nissan presented no witness to contest Amanda's pain and suffering, nor expert testimony in opposition to Amanda's vocational impairment expert.[76]

Arguments and Inferences

55. Nissan, being envious of other car companies scoring a five star frontal crash rating, decided on a "cheap fix" midway through the R50 Pathfinder platform cycle. (Nissan's restraint expert did not deny that the torsion bar load limiter probably cost less than one dollar, and perhaps only twenty-five cents.[77])

56. Nissan, knowing that 9 to 10 inches of seat belt spoolout defeated the purpose of seat belts, defended its seat belt spoolout as a design "tradeoff."[78] Nissan claimed its restraint system balanced the hazards of excessive belt spoolout against excessive seat belt chest loads. Other than a tacit admission that it was *knowingly* trading the safety of some occupants (those weighing over 170 pounds *and* those weighing under 170 pounds but involved in accidents exceeding 38 mph velocity change), Nissan's evidence, or lack thereof, did not support its "tradeoff" defense. For example:

(a) Despite Maddox's discovery requests for any risk benefit analysis it conducted regarding its load limiter, Nissan could produce no document showing it studied the advantages and/or disadvantages of load limiters, or seatbelt spoolout vs. decreased chest loads.[79]

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[76] Amanda Maddox (VR: 12/08/11; 12:11:36-13:02:20); Dr. Crystal (VR: 12/07/11; 15:02:41); Dr. Selby (VR: 12/08/11; 11:04:09-11:34:40); Dr. Kearney (VR: 12/07/11; 15:50:32-16:48:27); and, Amanda's trial exhibit nos. 22, 23 and 24).

[77] Jeffrey Pearson (VR: 12/14/11; 14:33:19-14:33:26).

[78] Nissan continues its "tradeoff" defense. See Nissan's Brief at 5, 11 and 37.

[79] Nissan's Answer to Plaintiff's First Request for Production No. 12 (produce any risk benefit analysis for load- limiter).

(b) Despite Maddox's discovery requests for load limiter development testing, Nissan produced no developmental tests to support the claimed safety benefit of load limiters, or to determine the approximate amount of force at which load limiters should deploy, or the upper limit of seat belt spoolout. (The jury knew, from Gary Whitman's testing, that the load limiter in the Pathfinder paid out more webbing than Nissan's engineering specification allowed, and at a lower force.)

(c) Nissan did not present a single test report or document showing that the seat belts in its 1996, 1997, 1998 and 1999 model year Pathfinders, which did not have a load limiter, caused excessive chest loads.

(d) Nissan did not present a single incident report of a belted front seat occupant in a 1996, 1997, 1998 or 1999 Pathfinder suffering chest injury from seat belt forces in a real world motor vehicle accident.

(e) When Nissan's restraint expert, who touted the safety benefit of reducing chest loads on the elderly, was asked why Nissan did not add this inexpensive safety feature to its rear seat seat belts (recall that NCAP only tests the front seat belts), Nissan's expert answered: "I don't have an answer for that."[80]

[80] Jeffrey Pearson (VR: 12/14/11; 14:33:26-14:33:38).

(f) Nissan's trial experts did not conduct any testing which demonstrated that 9 to 10 inches of seat belt spoolout benefited any occupant.

57. Plaintiff's restraint expert, Gary Whitman, performed a simple and inexpensive pull test on the Pathfinder seat belt system. The test gradually and constantly applies force to the seat belt and determines the amount of force required to "deploy" the load limiter and the maximum amount of seat belt webbing spoolout the load limiter allows. The jury watched the video of Mr. Whitman's pull test, which demonstrated that the force required to deploy the load limiter was much lower than Nissan's design specification allowed, and the amount of belt spoolout substantially exceeded the amount allowed by Nissan's design specification.[81] As the trial court noted in its Order denying Nissan's motion for judgment n.o.v. and new trial:

> "[I]t was certainly a reasonable inference that Nissan had performed (or should have performed) a test as simple and obvious as a pull test …." One reasonable inference being that such a test would have confirmed Nissan's knowledge that the load limiter did not comply with its own engineering design specifications, and was unsafe.[82]

58. If Nissan knowingly "traded off" the safety of heavier occupants for the safety of elderly occupants, as it claims, it did not bother to warn that substantial portion of the U.S. population weighing more than 171 pounds. Not only was there no warning given about increased and substantial belt spoolout for heavier occupants (the jury found Nissan negligently failed to warn of this risk), the Owner's Manual for the Pathfinder does not contain the words "load limiter," or make any mention of this supposed safety device.

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[81] Gary Whitman (VR: 12/06/11; 12:30:05-12:34:15).

[82] Order Denying Nissan's Motion to Alter, Amend or Vacate, for New Trial, and Judgment Notwithstanding the Verdict. (Record on Appeal at 2759).

59. Nissan's conscious decision not to warn *over* one-half of the adult male population and a substantial portion of the female population of the United States that it had "traded off" the safety one expects from his/her seat belt is reprehensible.

60. Even if Nissan had scientific evidence supporting its "tradeoff" of the safety of heavier occupants for elderly occupants, Nissan has no explanation or defense for its collapsing seat. The jury personally observed the Pathfinder's flimsy seat, as well as examples of well-made seats with structural support which would never collapse under an occupant's weight. Nissan's poor seat design alone was reckless and reprehensible and warranted punitive damages. (And there are no FMVSS governing seat pan strength.)

61. It is a "*Bizarro World*"[83] when a car company designs a restraint to score well in one particular test situation (35 mph frontal barrier with 171 pound dummy), while placing people weighing more than 171 pounds, and all people in crashes exceeding 38 mph velocity change, at risk - simply for the sake of advertising a 5 star rating as opposed to a 4 star rating. Such conduct is not just bizarre, it is reprehensible.

62. Nissan points out that Amanda did not present evidence of other similar injuries or lawsuits. What Amanda had was evidence far more powerful – she had a 171 pound person sitting inches away from her, who was subjected to the exact same accident forces. Absent the unique facts of this case (or access to Nissan's destroyed developmental tests), one could never convince a jury that Nissan's "safety feature" actually caused Amanda's injuries.

It is the unique facts here which proves the defective and unreasonably dangerous condition of the Pathfinder. It is Nissan's conduct – no documentation for its claimed safety tradeoff, destroyed testing, failing to warn people it knowingly put at risk, collapsing seats,

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[83] Brief of *Amici Curiae,* Association of Global Automakers, etc., at 1.

and trading safety for advertising stars – which warranted the jury's punitive damage verdict.

ARGUMENT

I. THE EVIDENCE SUPPORTS PUNITIVE DAMAGES.

The only issue before the Court is whether there is sufficient evidence to support punitive damages. Nissan does not acknowledge or address this issue, or the applicable standard of review. Nissan knows that when the evidence is considered under the appropriate standard of review, the jury's award of punitive damages must stand.

A. Standard of Review

While counsel for Amanda Maddox do not wish to unnecessarily lengthen this brief, the appropriate standard of review, quoted at page 1, bears repeating:

> The role of an appellate court, when reviewing evidence supporting a judgment entered upon a jury verdict, is limited. The Court must only determine whether the trial court erred in failing to grant the motion for directed verdict. In doing so, all evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence. This Court, when reviewing a ruling on a motion for directed verdict, must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Finally, the appellate court must determine whether the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice.[84]

[84] *Osborne v. Keeney,* 399 S.W.3d 1, 8-9 (Ky. 2012) (internal quotation marks, footnotes and citations omitted).

While the above quoted standard of review comes from this Court's recent opinion in *Osborne v. Keeney,* the standard has long been followed. A cursory review of the Opinions of this Court in civil cases over the last 30 years which recite this standard are:

2013 – *Gibson v. Fuel Transport, Inc.*[85]

2004 – *Brooks v. Lexington-Fayette Urban County.*[86]

2002– *Sand Hill Energy, Inc. v. Ford Motor Co.*[87]

1998– *Bierman v. Klapheke.*[88]

1996– *Kroger Co. v. Willgruber.*[89]

1992– *Meyers v. Chapman Printing Co., Inc.*[90]

1990– *Lewis v. Bledsoe Surface Mining Company.*[91]

1988– *National Coll. Athletic Ass'n v. Hornung.*[92]

1985 – *Horton v. Union Light, Heat & Power Company.*[93]

This standard of review is also applied in criminal cases.[94]

It is ironic that Nissan can find and cite cases from federal appellate and district courts, and state court opinions from Florida, Georgia, Iowa, Missouri, Minnesota, Ohio, Texas and Wisconsin, but can't address the controlling issue or law before the Court.[95]

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[85] 410 S.W.3d 56, 59 (Ky. 2013) (standard of review discussed).
[86] 132 S.W.3d 790, 797-98 (Ky. 2004) (standard of review discussed).
[87] 83 S.W.3d 483, 490 (Ky. 2002) (standard of review discussed).
[88] 967 S.W.2d 16, 18 (Ky. 1998) (standard of review discussed).
[89] 920 S.W.2d 61, 64 (Ky. 1996) (standard of review discussed).
[90] 840 S.W.2d 814, 821 (Ky. 1992) (standard of review discussed).
[91] 798 S.W.2d 459, 461-62 (Ky. 1990) (standard of review discussed).
[92] 754 S.W.2d 855, 860 (Ky. 1988) (standard of review discussed).
[93] 690 S.W.2d 382, 385 (Ky. 1985) (standard of review discussed).
[94] *Young v. Com.,* 426 S.W.3d 577, 581 (Ky. 2014), *citing Com. v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991).
[95] This is not to say that Nissan accurately states the holding of the foreign cases it cites. For example, Nissan cites *Clark v. Chrysler Corp.,* 436 F.3d 594 (6th Cir. 2006) for the proposition that punitive damages are not permitted here. (Nissan's Brief at 21, 34-35 and 37). In *Clark,* the Sixth Circuit reduced, but upheld, the jury's punitive damages award even though the defective door latch complied with the FMVSS door latch standard. *And see, Clark v. Chrysler Corp.,* 310 F.3d 461 (6th Cir. 2002), *vac. by* 540 U.S. 801, *remanded to* 436 F.3d 594.

Nissan spends two pages of its brief (Nissan's Brief at 31-32) discussing *Gryc v. Dayton-Hudson Corp.,* 297 N.W.2d 727 (Minn. 1980), a 34 year old case affirming the jury's $1 million punitive damages verdict. Nissan takes solace in the fact that its conduct here is not as bad as selling highly flammable pajamas to children.

Nissan's conduct, under the appropriate standard of review, can be viewed as more reckless, wanton and reprehensible than the following situations where punitive damages were either upheld on appeal, or the trial court was reversed for not instructing the jury on punitive damages:

(1) Car dealer's selling of customer's vehicle while customer was test-driving dealer's vehicle. *Hensley v. Paul Miller Ford, Inc.*[96]

(2) Gas company employees' less than thorough investigation of home owner's report of smelling gas inside home, and gas company's failure to adopt "model emergency plan." *Horton v. Union Light, Heat & Power Co.*[97]

(3) Hospital administrator's firing of employees for their failing to perjure themselves in administrator's criminal trial. *Northeast Health Management, Inc. v. Cotton.*[98]

(4) Water Company misrepresented the dangerous nature of a highway condition, violated its own safety policies, and disregarded the manual on Uniform Traffic Control Devices. *Phelps v. Louisville Water Co.*[99]

(5) Hospital's negligence leads to bedridden patient's sacral decubitus ulcers. *Thomas v. Greenview Hosp., Inc.*[100]

Nissan cites *Chrysler Corp. v. Wolmer,* 499 S.W.2d 823 (Fla. 1986), for the proposition that punitive damages are not permitted "where alleged injury-causing defect was in compliance with federal standards." (Nissan Brief at 22, footnote 12.) The opinion actually turns on the fact that Florida (unlike Kentucky) does not allow punitive damages for "even gross negligence," it requires "a wanton disregard for life equivalent to manslaughter" *Wolmer, supra,* at 824, 826.

Nissan cites *Brand v. Mazda Motor Corp.*, 978 F.Supp. 1382 (D. Kan. 1997), for the proposition that punitive damages are not allowed "when [a car company] complies with FMVSS." (Nissan's Brief at 22, footnote 12). In fact, while the trial court granted Mazda's motion for summary judgment regarding punitive damages, the Court's opinion specifically states: "Nor does compliance with federal regulatory standards cut off liability for punitive damages...." *Id.* at 1393.

[96] 508 S.W.2d 759 (Ky. 1974).
[97] 690 S.W.2d 382 (Ky. 1985).
[98] 56 S.W.3d 440 (Ky. App. 2001).
[99] 103 S.W.3d 46 (Ky. 2003)
[100] 127 S.W.3d 663 (Ky. App. 2004), cited with approval in *MV Transportation, Inc. v. Allgeier*, 433 S.W.3d 324, 338 (Ky. 2014).

(6) Failure to test weed eater, and marketing the product despite safety concerns. *Sufix, U.S.A., Inc. v. Cook.*[101]

(7) Failure to test truck's door latch for twist-out failure, despite test not being required by FMVSS, and door latch complying with FMVSS 206, the door latch standard. *Clark v. Chrysler Corporation.*[102]

(8) Teenage driver's speeding and failure to heed passenger's warning that "you know there's a curve up ahead." *Gersh v. Bowman.*[103]

(9) Failing to follow company policy and assist wheelchair passenger exiting special transit bus, and allowing injured passenger to lay on cold ground while bus company investigated accident instead of obtaining prompt medical care for the injured passenger. *MV Transportation, Inc. v. Allgeier.*[104]

The evidence, considered in the light most favorable to Amanda Maddox, and giving Amanda the benefit of all reasonable inferences and deductions, supports the punitive damage award. The trial court did not err. Even if this were a close call, and it is not, there is nothing to suggest that the jury's verdict is so palpably or flagrantly against the evidence as to indicate the verdict was reached as a result of passion or prejudice. In short, the Court of Appeals should be affirmed by this Court. The jury and trial court got it right.

B. The Missing Test Reports

Nissan makes a design trade-off defense, but destroyed all of its developmental testing which it claims supported trading off the safety of *all* front seat occupants. Nissan even destroyed its list of the developmental tests it performed/claimed to perform. This

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[101] 128 S.W.3d 838 (Ky. App. 2004).
[102] 301 F.3d 461 (6th Cir. 2006), *vac. by* 540 U.S. 801, *remanded to* 436 F.3d 594. .
[103] 239 S.W.3d 567 (Ky. App. 2007).
[104] 433 S.W.3d 324 (Ky. 2014).

missing evidence alone is sufficient to support an inference of Nissan's reckless and wanton conduct. *University Medical Center, Inc. v. Beglin.*[105]

In *Beglin*, this Court, quoting now Justice Stephen Breyer, stated:

> When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him." (citation omitted) He further noted Wigmore's assertion that nonproduction alone "is sufficient by itself to support an adverse inference even if no other evidence for the inference exists."[106]

While *Beglin* primarily dealt with a missing evidence jury instruction, the Court noted the trial court may choose to "admit missing evidence testimony,"[107] as was done here.

C. The Dissenting Opinion

One Judge, while concurring on all other issues, did not believe there was sufficient evidence to support punitive damages.[108] With all due respect to the dissenting Judge, he was mistaken with regards to the evidence on these important factual issues:

(1) "Nissan conducted extensive testing of the design of the load limiter prior to its release beginning with the 2000 model year of the Pathfinder SUV."[109] This is inaccurate. There was *no evidence* of Nissan testing the load limiter, other than Nissan's discovery responses stating it destroyed its developmental tests, including even its list of

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[105] 375 S.W.3d 783 (Ky. 2011), *as modified* on denial of rehearing. In *Beglin*, this Court held that the evidence, including missing evidence, supported the jury's finding of gross negligence. However, punitive damages were set aside solely because the defendant-hospital did not authorize, ratify, or anticipate the gross negligence of its employees as required by the jury instructions and KRS §411.184(3) – an issue not raised or argued by Nissan in this case.

[106] *Id.* at 789 (citations omitted).

[107] *Id.* at 790.

[108] *Nissan v. Maddox*, Slip Opinion at 25, Maze, J. dissenting.

[109] *Id.* at 28.

the developmental tests conducted. As Nissan produced no testing, much less extensive testing, surely the jury was allowed to disbelieve Nissan's testing claim. Or, more likely, the jury could infer that Nissan conducted the tests, but destroyed the results because they supported Amanda's case.

(2) "The restraint system operated exactly as designed for Dwayne, but it completely failed for Amanda, who weighed significantly more than the [NCAP] test parameters had allowed."[110] This is inaccurate. The restraint system operated "exactly as designed" for Dwayne, just as it operated "exactly as designed" for Amanda. It was *the design* that failed Amanda, just as it would fail all others who (a) were in accidents below 38 mph delta-*v* ***and*** weighed substantially more than 171 pounds; or (b) were in accidents above 38 mph delta-*v* – regardless of weight.

(3) "Although Amanda claims that Nissan changed its seat belt design knowing that it was placing occupants heavier than 171 pounds at risk, there was no evidence to support this conclusion."[111] This is inaccurate. As Amanda's experts explained, and as Nissan acknowledges,[112] kinetic energy (or force) is defined as ½ mass x velocity^2. It is elementary physics that heavier occupants (mass) put greater force on the seat belt than lighter occupants at a given velocity change. Nissan defended the large amount of seat belt spoolout as a "design tradeoff," admitting it was trading the safety of heavier occupants for the claimed safety of elderly occupants. And if Nissan performed developmental tests for its load limiter, as it claimed it did (before destroying them), it had test results proving heavier occupants experienced excessive belt spoolout.

(4) "Furthermore, Nissan was fully aware of the danger caused by excessive spooling of seatbelt webbing during an accident, and it redesigned its seatbelt with a load limiter to address that problem."[113] This is inaccurate – and the exact opposite of the

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[110] *Id.*
[111] *Id.* at 29.
[112] Nissan's Brief at 3, fn. 7.
[113] *Nissan v. Maddox,* Slip Opinion at 29 (Maze, J. dissenting).

evidence. The evidence was that Nissan's 1996, 1997, 1998 and 1999 model years R50 Pathfinder *did not* contain a load limiter and *did not* allow belt spoolout. Nissan introduced its re-designed front seat belt systems with a load limiter in the 1999½ model year. The re-designed seat belt system with the load limiter did not "address" the spoolout problem – it was the spoolout problem.

With Nissan's deceptive and misleading presentation of the facts, and Nissan's insistence on presenting only Nissan's evidence in the light most favorable to Nissan, it is understandable how one could get the evidence confused. But under the proper standard of review, Nissan's misleading portrayal of facts may be disregarded. Notably, the dissent never concludes that the jury's verdict was palpably or flagrantly against the evidence, only that there was some evidence of "slight care"[114] on Nissan's part.

II. NISSAN'S ARGUMENTS

Although Nissan makes four separate arguments, each is merely a different recitation of the same argument – sufficiency of the evidence – without mentioning those words, or the proper standard of review.

A. Kentucky law allows punitive damages.

Nissan begins by arguing punitive damages may only be awarded for "gross negligence" meaning a "wanton or reckless disregard for the safety of other persons." Amanda agrees. The punitive damage jury instruction **submitted by Nissan** to the trial court,[115] like the punitive damage instruction submitted by Amanda, and like the punitive damage instruction given by the Court to the jury, states that the jury may award punitive

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[114] *Id.*

[115] Nissan's supplemental tendered jury instruction. Record on Appeal at 2341-2346.

damages only if the jury believes by clear and convincing evidence that Nissan acted with "reckless disregard for the lives and safety of others."[116] Unsurprisingly, Nissan maintains the evidence which **it** presented to the jury does not demonstrate gross negligence – but that is not the test. The test, correctly applied by the trial court and Court of Appeals, is whether Amanda's evidence, taken in the light most favorable to Amanda, with all reasonable inferences that may be drawn from her evidence, demonstrates "any evidence" that Nissan acted in reckless disregard for the safety of others. It does.

B. Rigging a test does not insulate against punitive damages.

Nissan's evidence of due care hinges on its crash test performance. Nissan repeatedly reminded the jury, as it has this Court, that its NCAP test results were positively stellar – five stars. Amanda did not object to Nissan presenting this obviously relevant evidence. Yet, excellent test scores mean nothing if you cheat on the test. Here, Nissan knew "the answer" to getting good chest deflection scores – allow seat belt spoolout. Nissan also knew that a safe amount of spoolout in a 35 mph test with a 171 pound dummy (1¾ inch), becomes a catastrophic amount of spoolout with a 240 pound person. Here, the load limiter allowed an incredible 9 to 10 inches of spoolout (and nearly a foot of spoolout in Mr. Whitman's pull test). Nissan claims it made well-reasoned, thoughtful design tradeoffs, but all Nissan really traded was a seat belt that restrained all occupants, for the marketing advantage of advertising a 5 star rating.[117] To the extent Nissan presented any evidence supporting its design trade-off defense, it had no explanation for why it knowingly traded off the safety of heavier occupants without telling them, *i.e.*, a warning.

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[116] Instructions of the Court. Record on Appeal at 2430.

[117] The load limiter not only placed occupants weighing over 171 pounds at risk, it placed occupants weighing less than 171 pounds at risk when involved in accidents where the velocity change was greater than 38 mph.

Neither did Nissan have any explanation for why its seats would collapse in foreseeable collisions.

C. The trial court did not err.

When one applies the correct standard of appellate review, which Nissan chooses to ignore, Nissan's Argument C becomes nonsensical. There was sufficient evidence to support punitive damages, and it would have been error for the trial court not to instruct the jury on punitive damages.

A trial court must instruct the jury on punitive damages where there is any evidence to support an award of punitive damages. This Court recently held in *MV Transportation, Inc. v. Allgeier*[118] that the trial court erred in granting summary judgment as to the plaintiff's punitive damage claim where the evidence showed the defendant failed to follow its own policies and procedures, and delayed getting help for the injured plaintiff.[119] Nissan's conduct here is much more reprehensible.

Nissan criticizes the trial court's order overruling its motion for judgment notwithstanding the verdict because it did not address Nissan's sufficiency of the evidence argument. To the contrary, the Order "reiterates and incorporates all of its prior rulings" arising from many detailed discussions with both parties about punitive damages from Nissan's pretrial motion for summary judgment through its post-trial motions.[120]

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[118] 433 S.W.3d 324 (Ky. 2014).
[119] *Id.* at 337-39.
[120] See trial court's order denying Nissan's motion to alter, amend or vacate, for new trial, & judgment notwithstanding the verdict.

D. The Court of Appeals did not err.

1. Kentucky law allows the imposition of punitive damages based on the evidence presented in this case.

While not to Nissan's liking, the Court of Appeals addressed the evidence heard by the trial court and jury. To the extent Nissan even addresses Amanda's trial evidence, its description is pure hyperbole. For example, Nissan states punitive damages were not warranted because it could not meet Amanda's impossible "requirement" that it test for "every conceivable passenger size and shape and susceptibility to injury (such as a ruptured gastric bypass)"[121]; that it conduct "every conceivable type of crash test;"[122] and, that it design an occupant restraint system to prevent Amanda's "specific injuries."[123] Obviously, this was not Amanda's claim at all. And Amanda never claimed that "designing and testing an occupant restraint system as required by federal regulations was improper."[124] Yet, it was undisputed that FMVSS 208 and NCAP testing only tested seat belt performance with a 50th percentile male dummy. Other than a single seat belt hardware test (performed by the Takata Corporation), which only tested how much force the seat belt could withstand without breaking apart,[125] Nissan produced no testing to show how the seat belt would perform for an occupant weighing over 171 pounds. With or without its destroyed testing, Nissan knew its seat belt would spool out more for heavier occupants.

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[121] Nissan's Brief at 25.
[122] Nissan's Brief at 25.
[123] Nissan's Brief at 6.
[124] Nissan's Brief at 7. As pointed out in Amanda's Brief, there are no FMVSS requiring load limiters, and no FMVSS which governs seat pan strength.
[125] Kazuo Iwasaki (VR: 12/13/11; 16:30:55-16:31:45).

2. The punitive damage award, less than a 1:1 ratio when compared to the compensatory damage award, did not violate Nissan's right to Due Process.

Finally, Nissan argues that the amount of punitive damages awarded violates due process. *BMW of North America, Inc. v. Gore*[126] sets out the "substantive standard for determining the jury award's conformity with due process." Importantly, reviewing courts are to consider the degree of reprehensibility of the defendant's conduct and the ratio of compensatory to punitive damages.

With respect to reprehensibility, the Court of Appeals examined the case using the factors found in Gore and found: (1) Amanda suffered severe physical injuries; (2) Nissan exposed other occupants to risk; (3) every time Nissan manufactured a Pathfinder with the load limiter, it repeated the conduct; and, (4) there existed a reasonable inference that Nissan utilized trickery or deceit by design the vehicle for the safety of a crash test dummy and not for foreseeably heavier passengers.[127] The Court of Appeals correctly held that the award was not palpably or flagrantly against the evidence.

As to the ratio of punitive to compensatory damages awarded, Nissan neglects to tell this Court it is **less than 1:1.** While Nissan argues its conduct was not reprehensible enough to support punitive damages, the trial court and Court of Appeals disagreed. The trial court, in denying Nissan's Motion to Alter, Amend or Vacate, found the ratio of punitive damages to compensatory damages was "reasonable," and "well within the constitutional limit." Despite Nissan's criticism, the trial court correctly applied the "first blush" rule as endorsed by *Ragland v. Digioro.*[128]

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[126] 517 U.S. 559 (1996).
[127] The Court of Appeals did not err in finding Nissan's conduct to be reprehensible.
[128] 352 S.W.3d 908, 921 (Ky. App. 2010).

III. RESPONSE TO *AMICI CURIAE* BRIEFS

Amici Curiae start down the wrong path by accepting Nissan's "statement of the case" as the evidence heard by the jury.[129] It isn't.

Amici Curiae urge the Court to adopt a bright line rule – compliance with regulation precludes punitive damages - despite what the rest of the evidence shows.

A. DRI Brief

DRI argues for adoption of the "Georgia Rule" for determining when punitive damages may be awarded. Upon investigation, the "Georgia Rule" does not exist, and DRI's argument borders on the comical.

DRI bases it brief on the case of *Stone Man, Inc. v. Green,*[130] a 1993 opinion from the Georgia Supreme Court. In *Stone Man*, the Georgia Court devotes two paragraphs of a two page opinion to its review of the jury's punitive damage award in a nuisance case. The Georgia Supreme Court simply comments that "compliance with applicable State regulatory laws does *tend to show* that there is no clear and convincing evidence of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences."[131]

The decision of the Georgia Supreme Court in *Stone Man* was no different from those commonly faced by appellate courts all around the country – whether the evidence presented at trial was sufficient to support the jury's verdict. The Georgia Supreme Court concluded: "Accordingly, we hold that the award of punitive damages in this case is not

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[129] DRI's Brief at 10-11; Association of Global Automakers, etc. Brief at 1.

[130] *Stone Man, Inc. v. Green,* 435 S.E.2d 205 (Ga. 1993).

[131] *Id. at* 206 (emphasis added). No one, including Amanda Maddox, would argue with this obvious statement. But evidence which "tends to show" something, does not "conclusively establish" that something.

supported by the evidence and must be reversed."[132] A reading of *Stone Man* does not reveal the mythical "Georgia Rule" seen by DRI. (A copy of *Stone Man, Inc. v. Green* is located in the Appendix at tab 3, page 1).

To the extent one could argue *Stone Man* fashioned the new "Georgia Rule" for reviewing punitive damages, the Rule was short-lived. The following year, 1994, the Georgia Court of Appeals decided *General Motors Corp. v. Moseley.*[133] *Moseley* was the highly publicized trial involving GM's side saddle gas tanks which were located outside the frame rails of its pickup truck and subject to rupture in side-impact collisions. The evidence revealed that the GM side saddle fuel tanks "complied with the FMVSS 301, requiring withstanding side impact crashes at 20 mph,"[134] and that GM "tested the truck for side impact collisions at 50 mph, which far exceeded the industry standard of 20 mph."[135]

While the Court reversed the judgment on evidentiary issues, which had the effect of reversing the jury's $101 million punitive damage award, the Court stated:

> [N]othing in *Stone Man* precludes an award of punitive damages where, notwithstanding the compliance with actual safety regulations, there is other evidence showing culpable behavior.[136]

(A copy of *General Motors Corp. v. Moseley* is located in the Appendix at tab 3, page 4).

The *Moseley* opinion recognizes that a bright line rule based on complying, or not complying, with government regulations or industry standards is not the appropriate standard for appellate review. Interestingly, General Motors tried to preclude the fact that industry standards "promulgated by the Society of Automotive Engineers (SAE)

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[132] *Id.*
[133] 447 S.E.2d 302 (Ga. App. 1994), *abrogated* on other grounds by *Webster v. Boyett,* 496 S.E.2d 459, 463 (Ga. App. 1998).
[134] *Id.*
[135] *Id.* at 310.
[136] *Id.* at 311.

recommend that fuel tanks should be protected by the frame and body of a vehicle."[137] The Court states:

> The inquiry about the SAE recommendation and the fuel tank design utilized by other manufacturers concern the standard in the industry, which was relevant "although not conclusive" to whether GM exercised ordinary care...."[138]

It is doubtful that DRI would argue for a bright line rule which required a punitive damage jury instruction be given when the undisputed evidence reveals a manufacturer violates government regulations or industry standards.

In the 20 plus years since *Stone Man* and *Moseley* were decided, the Georgia Supreme Court has never endorsed or discussed a "Georgia Rule," or determined the Georgia Court of Appeals misinterpreted its holding in *Stone Man.*

The true "Georgia Rule," like the "Kentucky Rule," requires a case-by-case review of the trial evidence to determine its sufficiency to support the jury's verdict. This is the longstanding and correct standard of review, and should not be disturbed.

Finally, DRI, like Nissan, completely ignores Nissan's flimsy and collapsing seat. The "seat evidence" alone was sufficient to support punitive damages.

B. Association of Global Automakers, etc. Brief

While *Amici* do not specifically argue for the "Georgia Rule," it makes the same basic argument – compliance with minimum government regulations should preclude punitive damages. The Association of Global Automakers does not cite any authority to support its argument - and for good reason - this argument has been rejected by every court which considered it.[139]

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[137] *Id.*
[138] *Id.*
[139] *See, e.g., Silkwood v. Kerr-McGee corp.*, 769 F.2d 1451, 1458 (10th Cir. 1985) ("substantial compliance with a regulatory scheme does not bar the award of punitive damages."); *Clark v. Chrysler Corp.*, 310 F.3d

Amanda will reply to the Association of Global Automaker's argument that a recent study supports the benefits of load limiters, even to heavier occupants.[140] First, this 2013 report was not evidence during the 2011 trial. Secondly, the Association of Global Automakers misstates the report. While the report attributes some fatality reduction to load limiters *and* seat belt pretensioners in passenger cars,[141] the report found no such reduction in light trucks and sports utility vehicles, such as the Nissan Pathfinder.[142] Importantly, the reduction of fatalities in passenger cars makes sense, considering prudent car manufacturers, like Volvo, allow approximately 2 inches of seat belt spool out.

Interestingly, the NHTSA report acknowledges:

> Furthermore, the agency [NHTSA] may have indirectly encouraged their [pretensioners and load limiters] installation through its frontal New Car Assessment Program test, a 35 mph impact into a rigid barrier with belted dummies. It soon became apparent that vehicles could improve their test results by adding pretensioners and load limiters to their belt systems.[143]

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461 (6th Cir. 2002), *vac. by* 540 U.S. 801; *remanded* to 436 F.3d 594 (manufacturer's compliance with FMVSS 206, the door latch standard, did not preclude punitive damages in defective door latch case.); *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981) (we disagree "that compliance with these standards [FMVSS] negates recklessness as a matter of law."); and, *Flax v. Daimler Chrysler Corp.*, 272 S.W.3d 521, 536 (Tenn. 2008) ("We are also unconvinced by DCC's argument that compliance with federal regulations [FMVSS 207 – seat back strength] … should bar the recovery of punitive damages.")

[140]Ass'n of Global Automaker's Brief at 8, *citing* National Highway Traffic Safety Admin., DOT HS 811 835, Effectiveness of Pretensioners and Load Limiters for Enhancing Fatality Reduction by Seat Belts (2013).

[141] Unlike the Insurance Institute for Highway Safety, which found a 36% increase in deaths in vehicles with load limiters. M. Brumbelow, *Effects of seat belt load limiters on driver fatalities in frontal crashes of passenger cars.* Insurance Institute for Highway Safety, SAE presentation, May 16, 2007, as discussed by Gary Whitman at trial. Gary Whitman (VR: 12/06/11; 13:11:04 – 13:14:13). *Amici* cite a 2013 publication, National Highway Traffic Safety Admin., DOT HS 811 835, *Effectiveness of Pretensioners and Load Limiters for Enhancing Fatality Reduction by Seat Belts 2* (2013), which it claims to show the safety benefits of load limiters. (Global Automakers' Brief at 8 - 9). The study specifically states that no benefit was seen from the installation of load limiters in light trucks and sports utility vehicles, such as the Nissan Pathfinder.

[142] NHTSA, DOT HS 811 835, *supra,* at 16.

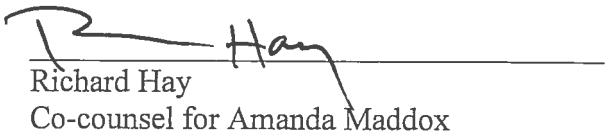
[143] *Id.* at 2.

And while the Association of Global Automakers argues this recent study "did 'not show any clear-cut differences between lighter and heavier' individuals,"[144] one must keep in mind that not all car companies allowed nearly unlimited seat belt spoolout as Nissan did. Most manufacturers were "cognizant of the point made by Volvo," that load limiters without a reasonable upper limit of belt spoolout would "not provide any protection in frontal crashes."[145]

CONCLUSION

Applying the proper standard of review, there is sufficient evidence to support punitive damages. The opinion of the Court of Appeals should be affirmed.

Respectfully Submitted,



Richard Hay
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[144] Association of Global Automakers Brief at 9.
[145] Amanda's trial exhibit 27, and see discussion at numbered paragraph 48 of this Brief, at page 16.